



**Ngahu & 5 others v Nairobi Metropolitan Services & 2 others (Environment & Land
Petition E004 of 2022) [2022] KEELC 13473 (KLR) (5 October 2022) (Ruling)**

Neutral citation: [2022] KEELC 13473 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND PETITION E004 OF 2022
MD MWANGI, J
OCTOBER 5, 2022**

BETWEEN

**WINNIE GAKENIA NGAHU 1ST PETITIONER
THOMAS ODHIAMBO 2ND PETITIONER
NATHAN NTHULI SIMON 3RD PETITIONER
RUTH AMBUJO 4TH PETITIONER
ZABLON OKUMU KOKEYO 5TH PETITIONER
MESHACK OJWANG ONGARA 6TH PETITIONER**

AND

**NAIROBI METROPOLITAN SERVICES 1ST RESPONDENT
NATIONAL POLICE SERVICE COMMISSION 2ND RESPONDENT
NAIROBI CITY COUNTY 3RD RESPONDENT**

RULING

The Petition

1. The Petitioners through a Petition dated January 3, 2022 aver that they had constructed their premises on their respective plots situated on land Parcel No LR No 13468 since 2016 with the knowledge of the Respondents and were living therein peacefully until sometime in 2021 when the Respondents' agents without notice invaded, trespassed, evicted and demolished their premises. The Petitioners contend that the said eviction and demolition of their premises by the Respondents was not only unconstitutional but inhuman as they were never granted a hearing, reasonable notice nor accorded a chance to salvage their properties. The Respondents' actions were a travesty to the administration of justice which greatly prejudiced the Petitioners.



2. The Petitioners therefore pray for a declaration that the demolition of their premises and consequent eviction by the Respondents was unconstitutional and inhuman. The Petitioners further pray for special damages and general damages. They also pray for costs of the petition as well as interest from the date of filing the Petition.

Preliminary Objection

3. The 2nd Respondent's Preliminary Objection is dated July 20, 2022. The 2nd Respondent contends that the claim against it is scandalous, frivolous and vexatious. Further that the 2nd Respondent should not be a party to the Petition since the alleged facts in the Petition are explicitly not within the purview of the 2nd Respondent's mandate as outlined in Article 246 of the Constitution.
4. The 2nd Respondent further contends that the Petitioners have not demonstrated how the 2nd Respondent contributed to the violation of the Petitioners' constitutional rights as alleged in the Petition. No evidence whatsoever has been adduced on how the 2nd Respondent was involved in the events outlined in the Petition. The 2nd Respondent therefore prays that the Petitioner's claim against the 2nd Respondent should therefore struck-off.

Court's Directions

5. The court directed that the Preliminary Objection be disposed off by way of written submissions. Both parties complied. The 2nd Respondent filed its submissions dated the July 8, 2022 whereas the Petitioners' submissions are dated July 20, 2022. The court has had the opportunity to read the submissions of both parties.

Issues for determination

6. In the court's opinion, there are two issues for determination;
 - a. Whether 2nd Respondent's Preliminary Objection meets the threshold of a Preliminary Objection.
 - b. Whether the Preliminary Objection is merited.

Analysis and determination

A. Whether 2nd Respondent's Preliminary Objection meets the threshold of a Preliminary Objection.

7. A Preliminary Objection was defined in the case of *Mukisa Biscuits Manufacturing Co. Ltd...vs... West End Distributors Ltd* (1969) EA 696 in the following words: -

“So far as I am aware, a Preliminary Objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration”.

8. Sir Charles Newbold, J.A stated that: -

“A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact had to be ascertained or if



what is sought is the exercise of judicial discretion. The improper raising of points by way of Preliminary Objection does not nothing but unnecessarily increase costs and, on occasion, confuse the issue. The improper practice should stop”.

9. In *Quick Enterprises Ltd v Kenya Railways Corporation*, Kisumu HCCC No 22 of 1999, the Court held that: -

“When preliminary points are raised, they should be capable of disposing the matter preliminarily without the Court having to result to ascertaining the facts from elsewhere apart from looking at the pleadings.”

10. Again in case of *Oraro v Mbaja* (2005) 1KLR 141 the court held that:-

“Anything that purports to be a Preliminary Objection must not deal with disputed facts and it must not derive its foundation from factual information which stands to be tested by rules of evidence”.

11. The 2nd Respondent argues that its functions are provided for under Article 246 of the *Constitution*. It contends that its inclusion in the pleadings herein is erroneous.
12. A Preliminary Objection consists of a point of law which has either been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. The 2nd Respondent’s Preliminary Objection, in this court’s view is clearly discernible out of the pleadings.

B. Whether the Preliminary Objection is merited

13. The Petitioners in their Petition at paragraph 8 describe the 2nd Respondent as ‘a body corporate established under Article 245 of the *Constitution of Kenya, 2010* and the body that executed the illegal demolition of the Petitioners’ premises.’
14. The 2nd Respondent in the plaint is the National Police Service Commission (hereinafter referred to as ‘the Commission’). The Commission is established under Article 246 of the *Constitution* not Article 245 as wrongly pleaded by the Petitioners. Its mandate is to:-
- a. Recruit and appoint persons to hold or act in offices in the service, confirm appointments and determine promotions and transfers within the national police service;
 - b. Observe due process, exercise disciplinary control over and remove persons holding or acting in offices within the service; and
 - c. Perform any other functions prescribed by national legislation.
15. The office that is established under Article 245 of the Constitution is the office of the Inspector General of the National Police Service. Article 245(2)(b) gives the Inspector General independent command over the National Police Service. The position is augmented by section 10 of the *National Police Service Act*. The import of this is that the Inspector General is not subject to the directions of the National Police Service Commission or any other person for that matter, in the conduct of his mandate.
16. The 2nd Respondent is therefore right when they submit that the Commission is not involved in the day to day command and deployment of police officers. That is the exclusive preserve of the Inspector General. How then can they be held liable for the alleged actions of the police?



17. The Petitioners in their submissions present a lame counter argument to the effect that since the Commission is the employer of the police force then it is vicariously liable for the acts and or omissions committed by the police.
18. With tremendous respect, the Petitioners' argument is not tenable in law. The Commission's mandate is limited and clearly does not include the day to day command and deployment of the police. The office that the Petitioners should have sued is the office of the Inspector General of the National Police Service.
19. This court finds that the Preliminary Objection by the 2nd Respondent therefore has merit and is hereby upheld.
20. Accordingly, the Petitioners' claim against the 2nd Respondent is struck out with costs. The Petitioners are further ordered to amend their Petition and remove the name of the 2nd Respondent within 30 days from the date hereof. They will be at liberty to add any other party(s) they deem necessary to their Petition within the same timelines.

It is so ordered

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 5TH DAY OF OCTOBER, 2022

M.D. MWANGI

JUDGE

In the virtual presence of: -

Mr. Oduor for the Petitioners.

Ms. Ombui holding brief for Opiyo for the 2nd Respondent

No appearance for 1st and 3rd Respondent.

Court Assistant Hilda

M.D. MWANGI

JUDGE

